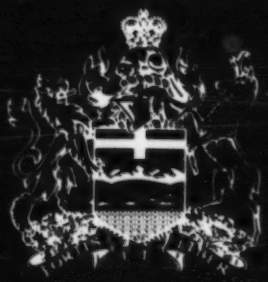
SPECIAL REPORT OF THE OMBUDSMAN



PROVINCE OF ALBERTA

Drug Testing Procedures In Provincial Correctional Institutions 1988

DRUG TESTING PROCEDURES IN PROVINCIAL CORRECTIONAL INSTITUTIONS

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A: BACKGROUND TO THE REPORT

In response to a number of complaints from inmates in Alberta Correctional Centres about a new policy to test urine for illicit drugs, I announced, on January 27, 1988 that I would investigate the testing on my "Own Motion." This means I undertook inquiries on my initiative rather than in connection with a specific complaint or complaints.

In keeping with past practice on Own Motion investigations, I agreed to make the report of my investigation public.

Two Alberta Correctional Centres, Fort Saskatchewan Correctional Centre and Calgary Correctional Centre began using Enzyme Mediated Immunoassay Testing (EMIT) equipment on December 1, 1987 on a pilot project basis to test urine samples from inmates for contraband drugs. Grierson Centre in Edmonton, was also using the same tests, but since the investigation began Grierson Centre has been turned over to Native Counselling Services and as of April 1, 1988 was no longer considered part of our inquiries.

Following an internal review within the Department of the Solicitor General (which administers all provincial correctional centres) a decision was made to expand the program to Calgary

Remand Centre and to Belmont Correctional Centre in Edmonton.

B: JUSTIFICATION FOR TESTING

At the outset, it was necessary to establish that the Department of the Solicitor General could justify a need to identify inmates abusing drugs.

The Department initiated drug testing partly in response to recommendations contained in a report by Assistant Chief Judge C.H. Rolf of the Provincial Court of Alberta. The report was a result of an Inquiry under the Fatalities Inquiries Act, into the death of an inmate who contacted hepatitis B through his use of illicit drugs. In addition, the Department identified 13 major incidents in provincial institutions in which drugs played a significant role within a 21 month span ending in December, 1987. Included in the summary were three deaths, a sexual assault, an assault on staff and three disturbances causing property damage. Over and above these major events, 50 known cases of drug overdose were recorded in the provincial correctional centres in 1987. The department can also document drug abuse through other means such as records of confiscated drugs and drug paraphernalia, records of institutional charges for drug related offenses and anecdotal reports from staff and inmates. While the use of illict drugs is clearly a serious problem, the number of incidents must also be considered in context. On any given day the correctional institutions house between 2,200 and 2,300

people and, including remanded individuals, about 30,000 people a year go through the system.

This information is sufficient to convince me that drugs are commonly used by inmates and that such abuse leads to serious problems both for the administrators of the correctional centres and the inmates themselves. Not all inmates wish to be part of the drug culture and even some of those who are willing to use drugs may not wish to be subject to the violence and intimidation which at times accompanies drug use. In some cases the intimidation extends beyond the prison walls as family and friends of incarcerated people may be pressured into smuggling drugs into the institution during visits.

C: DESCRIPTION OF PROGRAM

The Department began a three month trial of drug testing procedures on December 1, 1987. While the official period of the "pilot" ran out on February 29, 1988, the institutions have since expanded testing for drugs. Drug tests are not intended to be a replacement for conventional controls such as searches of inmates and living quarters, staff surveillance of chronic drug abusers, and inmate admission to drug awareness programs.

Although some inmates were chosen randomly for drug testing at the beginning of the program, that practice has been discontinued and at the present time staff must provide a reason for requesting that an inmate be tested. Inmates are given a

sterile container and must urinate into it in the presence of staff members of the same sex. In some circumstances inmates may be strip searched before they give a sample. Although in the past several inmates of the same sex were strip searched in the same room at the same time, strip searches are now conducted on an individual basis. If an inmate is unable to provide a sample immediately, 12 hours are given to comply. Inmates who refuse to give samples are charged internally with refusing to submit to urinalysis and the penalty they receive is the same as if they tested positive. In addition, inmates may be required to submit to urinalysis as a condition of a Temporary Absence or work assignment outside the Centre.

Tests are carried out using a Syva EMIT-ST (ST means "single test") analyzer. This testing is carried out either by nursing staff or non-medically trained management staff, depending upon availability within a particular institution. Training of the staff in the operation of the machine was provided by the Syva sales representative.

Samples are kept in locked refrigerators until the analyst is able to test them. If the test is negative the sample is discarded and the inmate judged not guilty. If it is positive, the analyst retests the same sample. If the second test is positive the inmate is charged with a disciplinary offence and must appear before the disciplinary panel of the Centre.

Typically, an inmate found guilty for the first time of using drugs at Calgary Correctional Centre receives seven days

disciplinary segregation plus 45 days loss of open visiting privileges and the privilege of attending special events. At Fort Saskatchewan such inmates receive seven days disciplinary segregation plus 90 days loss of open visiting privileges. Penalties for subsequent offenses are higher. Repeat offenders typically receive 14 days disciplinary segregation and an indefinite suspension of open visiting privileges. After finishing his or her time in segregation the inmate may be allowed visits behind glass, instead of open visiting privileges.

D: DESCRIPTION OF INVESTIGATION

In carrying out my investigation I was assisted by my two most experienced correctional investigators, my solicitor, and an expert toxicologist from a private medical laboratory. Extensive documentation from the Fort Saskatchewan and Calgary Correctional Centres, Grierson Centre and the Department of the Solicitor General was reviewed. The investigators and toxicologist examined the written procedures on conducting drug testing and then visited both centres to review the drug testing facilities and to observe staff perform their function. Formal interviews were carried out with 19 staff members and 20 inmates in order to ascertain if the procedures were in fact being followed and if they were, what problems arose. Individual files of many inmates tested for drugs were reviewed. Problems identified by both staff and inmates were identified and any steps taken to resolve them

were considered. During the investigation the Office of the Ombudsman continued to receive written and telephone complaints about drug testing in the two centres and about drug related problems in other centres. Information gained in those contacts was considered.

Technical information provided to the centres by Syva, the manufacturer of the EMIT testing equipment, was reviewed by the toxicologist and solicitor. Some points were clarified by the investigators in an interview with a Syva representative. The toxicologist reviewed the most recent information on drug testing in medical and technical journals and contacted colleagues in the field. He was familiar with the Syva EMIT-ST machine used by the correctional centre and the company's sales and support staff because the laboratory at which he works owns and operates a Syva EMIT-ST analyzer. The same laboratory also uses other varieties of drug testing equipment and the toxicologist was familiar with the advantages and disadvantages of all of them and was able to provide a sound comparison.

The Ombudsman's solicitor contacted knowledgeable people in the area of drug testing in both Canada and the United States in order to learn what has happened in other jurisdictions. Ten lawyers as well as two people from other Ombudsmen's offices were interviewed. Court judgements on the legality of drug testing were researched and current opinion in legal journals was reviewed. After familiarizing herself with existing legal principles, my solicitor studied the Alberta Correctional Centre

policies with particular emphasis given to determining whether they would be acceptable under the Canadian Charter of Rights and Freedoms.

In the course of their inquiries my investigators identified several errors made by staff in following the existing procedures covering the collection, transportation and storage of samples before analysis. My investigators found incidents of improper labelling of sample bottles, bottles left in unsecured settings, documentation unsecured, improper supervision during the collection of samples, no specific reasons given for testing, and no record of what prescription medication an inmate might have taken. It was established that as time progressed and with more experience by the correctional staff, the number of such mistakes has been reduced. The forms which authorize testing now list from the outset the reasons for testing and what medication the inmate may be taking.

My investigators were not satisfied that in some instances correctional staff properly appreciated the necessity of following prescribed procedures when collecting samples, or even knew all the required procedures. The importance of maintaining a proper chain of custody of evidence also did not seem to be well understood by all staff. Training on how to take urine samples or maintain a proper chain of custody of evidence appeared to be inadequate.

In one instance several inmates were strip searched in a single room and were not adequately supervised when they urinated

into the sample bottles. There is circumstantial evidence that indicates one of the samples was tampered with and as a result an innocent inmate was found guilty. A subsequent test the next day proved him not guilty. Because the first positive sample was not frozen and stored as it should have been, it is impossible, at this point, to prove the sample had been tampered with. Because several inmates were in the room at the same time, the possibility also exists that the samples were mislabelled or mixed up during transportation. This incident was taken very seriously by the department and thoroughly investigated. As a result proper corrective action has been taken.

In another incident a chronic and heavy drug abuser was found guilty of using drugs when he tested positive. After consulting with the toxicologist, it was my opinion that the inmate may have had drug residue left in his system well beyond the normal time frame recognized by the staff performing the test. When the director of the institution in which the inmate was housed was consulted, he agreed, without the necessity of my office launching a formal investigation into that specific matter, to reverse the guilty finding.

The importance of proper labelling and maintenance of the samples and maintaining continuity of evidence, did not appear to be understood at first and it appears staff have sometimes ignored the necessary procedures, if they were aware of them at all. An example occurred as recently as April when my staff observed the analyzing of an unlabelled container that was in

fact a plastic disposable drinking glass. The glass was placed on the request form and while it was very unlikely a mix up occurred in this case, the danger existed. The Department has now introduced sealed bottles, largely as a result of comments already made by my staff. If properly labelled, sealed bottles should ensure the right inmate sample is being tested and that it has not been tampered with.

My office has continued to investigate complaints from inmates found guilty of internal charges of using drugs in centres where the capability of drug testing does not exist. One example that might illustrate the problems that arise in that setting occurred when an inmate was judged guilty on the basis of standard sobriety tests akin to those requested at the roadside by police after they stop a driver suspected of drinking. Other indicators used to convict the inmate were medical readings such as blood pressure, pulse and respiration rate. The inmate maintained his innocence and asked for a urine or blood test, but the centre could not provide him with one. My staff reports that other inmates have also asked to be tested in similar circumstances.

Because random testing was done in the beginning of the pilot program, many more inmates were found innocent than guilty. Of the first 134 tests at Fort Saskatchewan, 89 were negative. Now that a reason must be given before an inmate is tested, the positive rate has risen and is close to 50 per cent. That figure still indicates that the EMIT test is proving large numbers of

inmates innocent who might otherwise have been judged guilty.

My investigators analyzed a large number of inmate files to ascertain if the penalties imposed on inmates have been consistent. The penalties have been somewhat harsher at Fort Saskatchewan due to the perception that drug problems there are more common and, partially because of the facilities, more serious. Penalties there will have to be re-evaluated when the new Fort Saskatchewan Correctional Centre is opened later this year. Loss of open visiting privileges will no longer be possible at the new institution because there is no provision in the new centre for visits behind glass. Restriction to glass visits will still be possible at Calgary Correctional Centre. Also, remand centres and minimum security centres such as Belmont have substantially different programs and populations. In those institutions penalties have to be appropriate to the setting. It appears that penalties given out to inmates within the same centre have been consistent.

Generally, the actual analysis and recording of the results is adequately performed. It is done by medical personnel at Calgary Correctional Centre and by management staff at Fort Saskatchewan. While the staff members conducting the tests have been sufficiently trained to competently complete the work, they are not qualified technologists. It is the opinion of the toxicologist that they may not always be able to correctly interpret results, resolve problems that arise with the equipment, or recognize problems. Technical support is presently

given only by the manufacturer of the EMIT testing equipment. My toxicologist believes it more appropriate that a monthly review of the work be done by an outside expert. The department has since indicated it may favor bringing in an outside expert regularly, but on an unannounced date. This could meet the toxicologist's recommendations. The toxicologist would also like the present analysts to review each other's work. Checking the documentation could catch minor mistakes such as transcription errors, one example of which was found by the toxicologist. That particular error did not have an impact on the inmate. Such reviews would also lessen the risk of test results being interpreted incorrectly due to overlooking relevant factors such as prescribed medication or human error.

The toxicologist also expressed concern that because the present staff conducting the tests have other primary duties, there may be occasions when they will have trouble giving the technical procedures their undivided attention. He pointed out that ideally such testing should be conducted in a laboratory setting by qualified technicians.

When the EMIT-ST analysis is correctly applied, experts rate its reliability between 95 to 99 per cent. While this standard hardly provides irrefutable evidence, given the risks of incorrect application or interpretation, it has been the conclusion of experts in other jurisdictions, primarily in the United States, that the test is acceptable within the prison setting, provided other supporting evidence of guilt or innocence

is available. Although the correctional centres are following good procedure by testing positive samples a second time, that will only eliminate analytical errors. A potential still exists for false positive readings due to reactions with other substances in the urine. The only way to obtain completely reliable results is to test the same sample again using a technology which analyses the urine in a completely different fashion, like gas chromatography or mass spectrometry. Those procedures are much more expensive.

E: LEGAL REVIEW

Drug testing in correctional institutions should be carried out in a manner that accords with the principles established in the Canadian Charter of Rights and Freedoms. The fact that a person is in a correctional institution necessarily involves some curtailment of his or her rights and freedoms. The issue of drug testing in correctional institutions has only been considered by one provincial superior court. This decision is not determinative in Alberta. Therefore, all conclusions are speculative and it is difficult to predict with certainty the way in which a court would decide the Charter issues. The most important provision of the Charter to be considered is Section 7 which reads:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with

the principles of fundamental justice."

The obligation to provide a urine sample under threat of punishment for non-compliance undoubtedly infringes upon the right to security of the person. However, Parliament can choose to infringe upon the right to security of the person if it does so in a manner consistent with the principles of fundamental justice. The Supreme Court of Canada has not set specific guidelines for determining when procedures are in accordance with the principles of fundamental justice, but has stated that the phrase will take on concrete meaning on a case by case basis as the courts address alleged violations of Section 7. My investigation indicates that some of the present procedures are unclear and could produce unfair or invalid results. My solicitor's review leads me to believe that a court could find proper drug testing processes to be acceptable under the Charter, but would find the present procedures need revision in accordance with the recommendations in this report in order to conform to the principles of fundamental justice.

In addition, Section 8 of the Charter states:

"Everyone has the right to be secure against unreasonable search or seizure."

Cases in the United States have held that urinalysis constitutes search and seizure, and my solicitor's review leads me to believe that such a conclusion would likely be accepted in Canada. The main question is what constitutes unreasonable search and seizure as contrasted with an acceptable search and seizure.

Given the fact that inmates are in a controlled setting with plenty of opportunity for staff to observe their behaviour, it is my conclusion that random testing would be found to be in contravention of Section 8 of the Charter. Section 10 of Alberta Regulation 138/77 under the Corrections Act appears to authorize random selection of inmates for urinalysis testing by stating that an inmate may be tested at such time and in such a manner as the director may require. In order to comply with the Charter, the regulation would require amendment to empower staff to demand urinalysis testing only when there are reasonable and probable grounds to believe that an institutional drug offence has been committed or is about to be committed.

F: CONCLUSION OF OMBUDSMAN

It is my conclusion that urine testing of inmates for illicit drugs can be justified and, provided certain conditions are met, such testing can be made acceptable under the Canadian Charter of Rights and Freedoms. Further, if properly administered, the drug testing program will provide a fairer, more objective method of identifying drug abusers within correctional institutions than has existed in the past. While there appears to be no practical method of eliminating illicit drugs within the correctional system, it is possible proper application of drug testing will decrease the violence, intimidation, security, and medical problems associated with drug

use. While technologies other than EMIT testing are available, I conclude they are prohibitively expensive, would take considerably longer to return the test results and would require more qualified technologists.

However, I do not believe the EMIT test results alone are sufficient to convict an inmate of an internal charge of using drugs, but if secondary supporting evidence can also be presented, the EMIT test can be a valuable tool. Examples of acceptable secondary evidence could be the apparent impairment of an inmate, the smell of marijuana smoke in his cell or the finding of drugs or drug residue in his living quarters. The fact that 50 per cent of tests are negative suggests to me that many inmates have been acquitted who might have been found guilty using the conventional sobriety or medical indicators alone. While those conventional methods continue to have a place, the EMIT test is a step forward.

I would be concerned if the EMIT test replaced all existing enforcement and rehabilitation techniques, but such is not the case.

G: SPECIFIC RECOMMENDATIONS

While the Department of the Solicitor General has conducted its own ongoing review of drug testing procedures and some of the recommendations listed below have already been implemented by the Department, I recommend that the following policies should be

adopted to ensure drug testing is done as fairly as possible and within bounds that are acceptable in accordance with the Canadian Charter of Rights and Freedoms:

1. The EMIT test must only be utilized if correctional staff have reasonable suspicion that an inmate is guilty of using drugs. The grounds for suspicion should be outlined on the form used to request that drug testing be done. Random testing should not take place.

2. The EMIT test must be supported by secondary evidence before an inmate can be convicted of internal charges of using drugs. Such evidence must be documented and considered by the disciplinary panel in conjunction with the results of the test.

3. Inmates should have access to the operable procedures covering the actual sample-taking as well as the procedures which should be followed to ensure a proper chain of custody of the evidence. Those procedures should be readily available, whether outlined on the request form, in the inmate handbook, or through some other means. The inmate has the right to be told the results of the test in a timely fashion, certainly within 24 hours of the test being completed. Technical information on the actual laboratory test does not

necessarily have to be shared with the inmate.

4. Once a sample is taken, it should be put in a self-sealing bottle, or sealed with tamper-evident tape. The seal or label should list the inmate's name, number and the date and time when the sample was taken. The staff who takes the sample should initial the tape or seal. The seal and label should be affixed before the bottle leaves the inmate's presence. When the sample bottle is received by the analyst he should certify that the bottle and request form have been received intact. The analyst should also record the time and date of the test.

5. Samples and request forms should be kept in a secure setting where they cannot be tampered with before or after analysis, or be available to people who do not have a need to have access to the information.

6. The request form should note what medication, if any, the inmate is taking. That information is available from the centre's medical staff.

7. An external quality control check is needed to review the results and documentation on a regular basis to ensure that all the proper steps have been followed and that

the interpretation of the results is proper. Arrangements should be made for expert advice other than from the manufacturer of the testing equipment to be available in case of unforseen problems. If drug testing becomes more prevalent in the future, it might be practical to set up a central laboratory and hire qualified technologists.

8. Policies need to be drawn up identifying how long positive samples should be stored and how long it is necessary to retain documentation. Samples should be retained long enough to allow for all appeals.

9. Correctional staff need to be more thoroughly trained so that they will understand the importance of observing all of the procedures. Standard operating policies should be compiled in one volume and copies should be conveniently placed where they can be consulted by staff.

10. Drug testing is still relatively new and developments throughout Canada and the United States should be closely monitored and any changes in standards or procedures examined and adopted if necessary.

11. The following technical improvements should be adopted to

ensure accuracy in drug testing:

a) Temperature of the refrigerator in which reagents (used by EMIT machine as a test medium) are stored should be checked and recorded daily.

b) When reagents are prepared, the date and initials of the person preparing them should be recorded.

c) A second analyst should review the documentation generated by the original analyst's work on a daily basis and sign after having done so.

d) For their own protection, staff should always wear gloves when testing specimens.

e) A cooler, more suitable room should be found for conducting the tests at the Fort Saskatchewan Correctional Centre until the institution moves to its new facility.